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No. 84-426

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA JOHNSON,

Petitioner,

—v.—

ALLYN & BACON, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

October 19, 1984

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QUESTIONS PRESENTED

1. Whether a Title VII plaintiff may bring and try her case under one legal theory (disparate treatment) before the district court and then seek a remand on appeal to re-try her case under a different legal theory (disparate impact)?

2. Whether the First Circuit's ruling that petitioner would have failed to meet her burden of proof under the disparate impact theory even if petitioner had raised that theory below was clearly erroneous?

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IN THE

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No. 84-426

BARBARA JOHNSON,

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—v.—

ALLYN & BACON, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

Respondent Allyn & Bacon, Inc.[1] submits this brief in opposition to petitioner's request that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit.

The September 3, 1982 opinion of the United States District Court for the District of Massachusetts is unofficially reported at 34 FEP Cases 795 and 30 EPD ¶ 33,065 and is reprinted at pages 31 through 48 of the Petition. The October 25, 1982

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1 In accordance with this Court's Rule 28, Allyn & Bacon, Inc.'s parent company is Esquire, Inc. whose parent company is 30th Century Corporation whose parent company is Gulf & Western, Industries.

Procedural Order of the District Court is reprinted at pages 18 to 21 of this Opposing Brief.

The March 29, 1984 decision of the United States Court of Appeals for the First Circuit is reported at 731 F.2d 64 (1st Cir. 1984) and is reprinted at pages 15 through 29 of the Petition. The May 29, 1984 decision of the First Circuit denying rehearing is unofficially reported at 34 FEP Cases 1742 and 34 EPD ¶ 34,417 and is reprinted at pages 51 to 54 of the Petition.

JURISDICTION

The District Court entered an Order of Dismissal on September 8, 1982. This order is reprinted at page 49 of the Petition. Petitioner then moved for a new trial and for amended and additional findings under F.R.Civ.P. 52 and 59 and the District Court entered a Final Order of Dismissal on November 30, 1982. This order is reprinted at page 17 of this Opposing Brief.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

(1) Supreme Court Rule 50.7

> ".7 In an appropriate instance, the Court may adjudge double costs."

(2) 28 U.S.C. § 1912

> "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

COUNTERSTATEMENT OF THE CASE

The basic facts of the case are set forth in the decisions of the District Court and the Court of Appeals. They will not be repeated herein.

When this suit was first instituted in 1977, petitioner claimed that she alone had been the victim of numerous acts of unlawful sex discrimination. These were disparate treatment claims and were so denominated by all parties, including petitioner's trial counsel. They were presented during a twelve-day trial before the Honorable Robert E. Keeton in June, July and August 1982. Judge Keeton dismissed all of petitioner's claims. Petitioner then moved for a new trial and requested additional and amended findings. Judge Keeton denied that motion.

On appeal to the First Circuit, petitioner (now represented by different counsel) argued (1) that the District Court had improperly rejected certain of her sex discrimination claims against respondent under the disparate treatment theory and (2) that she was entitled to a remand so she could re-try her case under the disparate impact theory. The First Circuit (1) affirmed the District Court's conclusion that "the ultimate decisions concerning Johnson were not based on Johnson's sex," thereby disposing of her disparate treatment claims, (2) held that, having brought and tried her case as a disparate treatment case before the District Court, petitioner could not raise for the first time on appeal the contention that she was entitled to a remand to re-try her case under a different legal theory (disparate impact) and (3) held that its own examination of the record convinced it that petitioner failed to meet the requirements of the disparate impact theory *even if* she had properly raised it before the District Court. Noting that petitioner had "absolutely failed to present any arguable reason why the district court erred in its disposition," that petitioner was basically restating arguments that the district court "properly rejected" and that petitioner's additional argument (the

disparate impact theory) "was not even presented to the district court," the First Circuit awarded respondent double costs under F.R.App.P. 38.

Petitioner filed a timely petition for rehearing raising only her disparate impact claim. The First Circuit denied this petition on two grounds—first, that petitioner had failed to raise her disparate impact claim before the District Court and, second, "on the merits" because petitioner had failed to satisfy her burden of proof under this disparate impact theory even if petitioner had raised that theory before the trial court. Although noting that it deemed petitioner's appeal to be "extremely weak in terms of presenting any issue of substance," the First Circuit decided, on rehearing, to give petitioner and her new counsel "the benefit of the doubt" and modified its order so as to award respondent regular, not double, costs.

In her petition before this Court, petitioner again merely restates the same arguments presented to and rejected by the First Circuit on two separate occasions, first, on the appeal and, second, on the petition for rehearing. Respondent contends that the First Circuit properly rejected those arguments and that petitioner's claim that the First Circuit's decision conflicts with decisions by other courts of appeals is simply wrong. Respondent further contends that there are no special and important reasons for granting certiorari in this case since it involves a unique factual and procedural situation and issues that are unlikely to recur. Moreover, the First Circuit properly rejected petitioner's claims under *both* the disparate treatment and disparate impact theories *on the merits* so petitioner's "question presented for review" is inaccurate and misleading. Finally, respondent respectfully requests that this Court award it double costs under this Court's Rule 50.7 and 28 U.S.C. § 1912.

REASONS FOR DENYING THE WRIT

POINT ONE

PETITIONER FAILED TO RAISE THE ISSUE OF DISPARATE IMPACT BEFORE THE DISTRICT COURT

It is a well-established rule of appellate review that, in the absence of exceptional circumstances, an issue or argument not raised before a district court will not be heard on appeal. The fundamental purpose of this rule is to promote the finality of judgments and to conserve judicial resources. In accordance with this rule, the First Circuit correctly found that petitioner improperly sought to raise the issue of disparate impact for the first time on appeal, after proceeding at trial entirely under the disparate treatment theory.

The First Circuit's refusal to consider petitioner's arguments under the disparate impact theory, on the ground that the issue had not been properly raised before the trial court, not only comports with numerous other decisions within that circuit but is also consistent with the approach applied throughout the circuits when litigants seek to raise new issues on appeal. See *Scott* v. *Pacific Maritime Association*, 695 F.2d 1199, 1203-1204 (9th Cir. 1983) (where employee, in Title VII case, failed to raise issue of continuing violation); *Payne* v. *McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1144-1146 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) (where employer, in Title VII case, sought to raise issue of whether the form of plaintiff's activities justified refusal to rehire); *Manning* v. *Lockhart*, 623 F.2d 536, 538 (8th Cir. 1980) (a civil rights action, where prisoner sought to raise issue of denial of parole); *Harrington* v. *Vandalia-Butler Board of Education*, 585 F.2d 192, 197 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979) (a Title VII case, where employee sought to raise issue of the propriety of a damage award); *Sandford* v. *R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 175-176 (4th Cir. 1978) (plaintiff in § 1981 action attempted to raise

a contrary position on appeal); *Gibson* v. *Kroger Company*, 506 F.2d 647, 653 (7th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975) (where plaintiff, in Title VII case, sought to raise an additional jurisidictional basis).

In this case, the First Circuit properly found that petitioner's case "was brought and tried under a disparate treatment theory" (Petition, p. 27). Significantly, petitioner cannot and does not dispute the First Circuit's finding (Petition, pp. 27, 52) that at no point did her trial counsel contend that the disparate impact approach should be followed. While petitioner refers to certain allegations in her original complaint (Petition, p. 9), she fails to note that before the trial began her trial counsel proposed a finding of fact and conclusion of law that "the unlawful acts of sex discrimination perpetrated by the defendant upon the plaintiff were willful and intentional" (No. 32). Of course, discriminatory intent is an issue only under a disparate treatment analysis.

Petitioner also does not controvert the First Circuit's express finding that respondent's counsel "specifically pointed out that the case was a disparate treatment case, and no objection to Allyn & Bacon's counsel's statement was forthcoming from Johnson's counsel" (Petition, pp. 27, 52). Respondent's counsel stated during his opening statement to the district court that ". . . this is what is known in Title 7 parlance as a disparate treatment case" (R. 32, Opposing Brief, p. 24). Again, during his closing argument, respondent's counsel stated: "The Court is aware, and I believe it is conceded by the Plaintiff, that in a disparate treatment case such as the present case, Plaintiff must show intentional discrimination" (R. 1659, Opposing Brief, p. 26). Petitioner's trial counsel not only did not object to these statements but in her own closing statement to the District Court specifically affirmed that she was raising a disparate treatment claim ("Mrs. Johnson claims disparate treatment against her was indeed intentional by her employer, Allyn & Bacon", R. 1688-89, Opposing Brief, p. 27). Thus, the First Circuit was entirely correct when it conducted its own review of the record herein and concluded that " . . . the fact

is that Johnson *brought* and *tried* her case as a disparate treatment case, and such it remained on appeal" (Petition, p. 52, emphasis in original).

Petitioner also misstates the record when she refers to her 1979 motion for leave to file an amended complaint. While petitioner acknowledges that this motion was never granted (Petition, p. 8), she claims the trial judge "established on the record the rule that he would take evidence under the allegations *of the amended complaint* until such time as there was an objection to him doing so . . . ." (*Ibid.*). After a lengthy discussion of the subject (R. 1-15), the district judge ruled the parties should proceed with their proof and the respondent should object to any proof it believed was "going outside the original complaint" (R. 11, Opposing Brief, p. 22). Thus, the First Circuit was correct when, after reviewing the record, it concluded the District Court had sustained respondent's objection to the introduction of any proof outside the scope of the original complaint (Petition, p. 52).

After the District Court's September 3, 1982 decision, petitioner filed a motion seeking a new trial and amended and additional findings under F.R. Civ. P. 52 and 59. In that motion, petitioner did *not* raise the claim that the trial judge should have applied the disparate impact theory. This motion followed the district judge's decision where he had held (Petition, p. 33) that petitioner must show intentional discrimination to prevail on one or more of her claims and, also, had specifically referred to the disparate treatment theory (Petition, p. 48, n. 17). Moreover, petitioner never raised the trial judge's alleged departure "from the accepted and usual course of judicial proceedings with respect to amending complaints, even after trial . . ." (Petition, p. 11) either in her post-trial motions or before the Court of Appeals. This claim is presented for the first time before this Court and, as such, is not a proper issue for review.

POINT TWO

THERE IS NO CONFLICT BETWEEN THE FIRST CIRCUIT'S DECISION BELOW AND DECISIONS OF OTHER COURTS OF APPEALS

Rule 17.1(a) of the Rules of this Court sets forth as one of the grounds for granting a writ of certiorari that the decision below is "in conflict with the decision of another federal court of appeals on the same matter." This Court has traditionally declined to grant certiorari (1) to resolve a conflict between or among appeals courts over an issue that is unlikely to recur or that results from a unique factual or procedural situation or (2) if the alleged conflict can be explained by variations in the factual patterns among the cases involved. 13 Moore *Federal Practice*, 2d Ed., 1982, ¶ 817.21, p. SC 17-22.

Petitioner correctly states that a litigant may assert both disparate treatment and disparate impact theories as alternative grounds for relief in the same case. But, as the First Circuit cogently noted, a District Court is not obligated to analyze every Title VII case under both theories "when only one of them is asserted by the claimant and no proof is adduced at trial to enable the court to adequately analyze the case under the other [theory]" (Petition, p. 53). This case involves precisely such a unique factual and procedural situation. Such situations are uncommon and are not likely to recur.

Petitioner claims (Petition, p. 13) there is a "clear" conflict between the First Circuit's holding and certain holdings by the Fourth Circuit. Nothing could be further from the truth. Petitioner cites, for example, *Wright* v. *National Archives & Records Service*, 609 F.2d 702 (4th Cir. 1979). However, while the Fourth Circuit did state in that case that disparate treatment and disparate impact theories could be urged as alternative grounds for relief in the same case, the Fourth Circuit was careful to state this would *only* be true where both theories were first properly pleaded by the plaintiff under F.R. Civ. P. 8(e)(2) and then

sufficiently supported by evidence under F.R. Civ. P. 41 (609 F.2d at 711). This critical portion of the Fourth Circuit's discussion was omitted from the quotation from the *Wright* case presented in the Petition. The instant case presents very different facts since herein petitioner's case was neither pleaded nor tried as a disparate impact case[2] and since petitioner did not adduce any proof to enable the trial court to analyze her case under the disparate impact theory. The First Circuit specifically held that *Wright* was inapplicable for these very reasons (Petition, p. 53), and the Petition contains no valid arguments to the contrary.

POINT THREE

PETITIONER HAS NOT SHOWN THAT THE FIRST CIRCUIT'S DETERMINATION THAT SHE FAILED TO SATISFY HER BURDEN OF PROOF UNDER THE DISPARATE IMPACT THEORY IS CLEARLY ERRONEOUS

The Petition herein proceeds on the assumption that the First Circuit "did not address the merits" of petitioner's disparate impact argument (Petition, p. 7) and dismissed her argument "out of hand, without reaching the merits" (Petition, p. 8) because she had not raised the argument before the trial court.

This grossly misstates the First Circuit's rulings. In its initial decision, the First Circuit *did* reach the merits of this claim. It stated (Petition, p. 27, n.8) that:

> "Our examination of the record convinces us that, *even if the disparate impact theory had been followed below*,

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2 It is the rule in the Fourth Circuit and elsewhere that, where a plaintiff's claims are limited to disparate treatment claims, a District Court need only analyze the case under the disparate treatment model. *Kralowec* v. *Prince George's County, Maryland*, 503 F. Supp. 985, 993 (D. Md. 1980), *aff'd*, 679 F.2d 883 (4th Cir.), *cert. denied*, 459 U.S. 872 (1982); *Brown* v. *ASD Computing Center*, 519 F. Supp. 1096, 1110 (S.D. Ohio 1981).

> Johnson failed to meet her basic requirement of proving that Allyn & Bacon employed a selection device which, although facially neutral, produced a significantly adverse impact on women" (emphasis added).

If there could be any doubt as to the Court of Appeals' position, it was dispelled by the Court's decision on rehearing. After noting (Petition, p. 52) that it had rejected petitioner's disparate impact claim on two separate grounds ("first, for her failure to raise it before the district court and, second, *on the merits*, for failure to satisfy her burden of proof", emphasis added), the First Circuit stated:

> "From our review of the record in the case before us, it seems clear that the nature of the evidence presented by Johnson at trial could not establish a case of employment discrimination based on the disparate impact model. Hence, *even if Johnson had raised the disparate impact theory before the district court*, she would not have prevailed in view of her failure to meet her burden of proving that a facially neutral selection device produced a significantly adverse impact on women" (Petition, p. 54, emphasis added).

Petitioner's assertion before this Court that the First Circuit did not reach the merits of her disparate impact claim is simply wrong.

Petitioner's disparate impact argument also founders for yet another reason. She claims (Petition, p. 7) the District Court found there were *two* requirements for a series editor's job—a college degree and previous sales experience. She then argues that, since respondent had previously waived her own lack of a college degree for other positions she had held, she was really denied a series editor's job because the single remaining requirement (sales experience) was a facially neutral policy that had a significant adverse impact on women.

Among the problems with this argument is that petitioner conveniently ignores the fact that both the District Court (Petition, p. 43) and the Court of Appeals (Petition, p. 25)

found there were *three* requirements for a series editor's job. These were (1) a four-year college degree, (2) at least one year's experience as a college textbook salesperson or acquisitions editor and (3) skills relating to people. Petitioner lacked not only the requisite college degree and the sales experience but, as the District Court expressly found: "It is just as clear that by mid- and late 1974, when plaintiff expressed her desire to become a Series Editor, the defendant had good cause to doubt her ability to get along with people both within and outside the company . . ." (Petition, pp. 43-44). In fact, as both the District Court and the Court of Appeals noted (Petition, p. 43, n.10, 25-26), the District Court's finding that petitioner had not proven she was qualified for a Series Editor's job negated one of the elements of her *prima facie* case and "thus was also a finding that Johnson did not establish her *prima facie* case" (Petition, p. 26).

There can be no dispute that petitioner did not meet this third requirement for a Series Editor's job. She challenged the District Court's adverse finding on appeal and lost. The Court of Appeals expressly held: "The finding that Johnson was unable to get along with her co-workers and authors is based upon sufficient evidence and cannot be said to be clearly erroneous" (Petition, p. 26). Petitioner's challenge was that this finding was erroneous as a matter of law. According to the First Circuit, she made "little or no effort to show that the district court drew the wrong conclusions from the evidence before it" (Petition, p. 16, n.1) and "has not even attempted to show that the district court's conclusion is clearly erroneous" (Petition, p. 26). As petitioner cannot and does not challenge those findings before this Court, she must be held to be bound by them for the purposes of this Petition.

Petitioner also errs when she states (Petition, p. 7) that the District Court made an "explicit finding" that respondent in large part excluded women from its sales force and, as a result, from series editorial positions. The Court of Appeals described this argument as "simply wrong" (Petition, p. 53). It stated that the language from the District Court's opinion "does not,

as appellant would have us hold, amount to a finding relevant to disparate impact" (Petition, p. 53). As the Court of Appeals also held, petitioner never adduced any proof during trial "to the effect that the sexual imbalance in Allyn & Bacon's sales force and series editorial staff was *caused* by the selection devices employed by Allyn & Bacon" (Petition, p. 53, emphasis in original).

To establish a *prima facie* case of discrimination under the disparate impact theory, a plaintiff must show that a specific selection procedure has "a causal connection to a class based imbalance in the work force" *Pouncy* v. *Prudential Insurance Company of America*, 668 F.2d 795, 800 (5th Cir. 1982). The Court of Appeals below properly relied on *Pouncy* (Petition, pp. 53-54) and the analysis of disparate impact claims contained in that case as a further reason for rejecting petitioner's disparate impact claims herein.

Petitioner again relies exclusively on statistics presented at the trial that between five and seven of respondent's forty College Division sales people were females and that all eleven of the series editors were male (Petition, p. 42). Both the District Court and the Court of Appeals found this statistical evidence[3] was "incomplete" since it did not also include information as to the number of qualified women in the relevant labor market (Petition, pp. 25, 42). See, *Lamphere* v. *Brown University*, 685 F.2d 743, 750 (1st Cir. 1982). In addition, as the District Court also noted (Petition, p. 42, n.9), petitioner only presented evidence as to two female applicants for sales positions. One (Anne Carlisle, a witness called by plaintiff) testified she applied for and was given a sales representative's position. Petitioner herself was the second applicant. The evidence showed that, although one of respondent's sales managers had expressed interest in having petitioner apply for a sales representative's job, petitioner withdrew her

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3 Petitioner again cites (Petition, p. 9) *Lee* v. *Russell County Board of Education*, 684 F.2d 769 (11th Cir. 1982). This case is inapposite for the reasons set forth by the First Circuit (Petition, p. 20, n.6).

"application" because she would have had to accept a lower salary as a sales representative and she did not want to do so.

The Court of Appeals, in agreement with the District Court, found that petitioner's statistical arguments "are not adequate to show discrimination" under either the disparate treatment or disparate impact theories (Petition, pp. 25, 27-28, n.8). Petitioner does not cite any contrary authorities.

The First Circuit carefully and painstakingly evaluated petitioner's disparate impact claim *on the merits* and found it to be legally and factually deficient. We submit that the First Circuit correctly articulated and applied the substantive legal analysis of the disparate impact theory. We submit further that the First Circuit's articulation and application of the disparate impact theory, given the facts of this case, is consistent with decisions in other circuits. See *Liberles* v. *County of Cook*, 709 F.2d 1122, 1130-1132 (7th Cir. 1983); *Mortensen* v. *Callaway*, 672 F.2d 822, 824 (10th Cir. 1982); *Contreras* v. *City of Los Angeles,* 656 F.2d 1267, 1275-1280 (9th Cir. 1981); *Johnson* v. *Uncle Ben's Inc.*, 657 F.2d 750, 752-753 (5th Cir. 1981); *Harris* v. *Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981). Moreover, the First Circuit's interpretation and application of the disparate impact standard is in full accord with the principles expressed in decisions of this Court. See *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

POINT FOUR

THIS COURT SHOULD AWARD RESPONDENT DOUBLE COSTS

Both Rule 50.7 of this Court's Rules and 28 U.S.C. § 1912 authorize this Court to award respondent double costs. We submit that this is an appropriate case for double costs. The Court of Appeals awarded double costs in its initial decision under F.R. App. P. 38, stating:

> "[Johnson] has absolutely failed to present any arguable reason why the district court erred in its disposition. She basically restates arguments that the district court properly rejected. Her additional allegation is based on a theory which was not even presented to the district court. Some penalty should attach to taking up our time with such a perfunctory appeal. Thus, we believe in the circumstances that appellee is entitled to recover double costs under F.R. App. P. 38" (Petition, p. 29).

On rehearing, the Court of Appeals modified this order to allow only regular costs. However, it did so only because it wanted to give petitioner and her new counsel "the benefit of the doubt". The Court expressly noted its opinion that "this appeal is extremely weak in terms of presenting any issue of substance" (Petition, p. 54).

We submit that petitioner is no longer entitled to "the benefit of the doubt." She has filed a petition for certiorari with this Court despite two prior express judicial warnings against taking up an federal appeals court's time with "a perfunctory appeal" and for presenting an appeal that is "extremely weak in terms of presenting any issue of substance." She has again only repeated the same perfunctory and extremely weak arguments that she presented to the Court of Appeals below. Her Petition is not only completely lacking in substance but in many instances seriously misstates the rulings made below. We submit this is an appropriate case for the imposition of the sanction of double costs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied and respondent should be awarded double costs.

Dated: October 19, 1984

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-3325-K

BARBARA JOHNSON,

Plaintiff,

v.

ALLYN AND BACON, INC.,

Defendant.

FINAL ORDER
November 30, 1982

KEETON, D.J.

Defendant's Motion to Amend Judgment to Award Attorney's Fees having been denied by order of November 23, 1982, and

Plaintiff's claims for attorneys' fees having been denied in the Order of September 3, 1982,

It is ORDERED:

This action is hereby dismissed.

By the Court:

GEORGE F. McGRATH, *Clerk*

/s/ ELLEN M. HAYS
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-3325-K

BARBARA JOHNSON,

Plaintiff,

—v.—

ALLYN & BACON, INC.,

Defendant.

October 25, 1982
Procedural Order

Plaintiff filed a suit on November 1, 1977, charging her former employer with unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Following a twelve-day trial held in this court during parts of June, July, and August of this year, I found against the plaintiff and for the defendant on the merits of all plaintiff's claims, and I ordered the action dismissed.

The case is before me now on various motions by the plaintiff and one motion by the defendant. The motions, which will be discussed separately below, are: plaintiff's motion for a new trial; plaintiff's motion for the court to amend its findings, make additional findings, and amend the judgment; plaintiff's motion for attorney's fees; and defendant's motion for attorney's fees. Defendant and plaintiff have each filed papers opposing the other's motions.

1. Plaintiff's Motion for a New Trial: Plaintiff argues that she is entitled to a new trial pursuant to Rule 59, Federal Rules

of Civil Procedure, because she was denied a "full and fair opportunity to cross-examine Defendant's witnesses William Boldermann and William Roberts adequately and sufficiently." Plaintiff's Motion for a New Trial at 1. I find that plaintiff was not denied this opportunity. Although I was forced repeatedly to urge plaintiff's counsel to confine questioning of Bokerman to relevant issues and did impose a time limit for cross examination, in fact I allowed plaintiff's counsel to go past that time limit until she had no further questions of Bokerman. As for Roberts, I note that both parties were held to time limits in the examination of this witness, and that plaintiff's cross examination took almost twice as long as defendant's direct examination. Finally, I must comment that no time limits on either direct or cross examination would have been necessary had plaintiff and her counsel even started to comply with my frequent requests and orders to them to be prepared in court and to limit their examination of witnesses to relevant subject areas. Had they done so, I suspect the trial would have been concluded in three to four days, instead of the twelve it took, with no loss of fairness to either party.

2. Plaintiff's Motion for the Court to Amend its Findings, Make Additional Findings, and Amend Its Judgment. The plaintiff makes two general arguments here. The first, presented in great detail and with many specific examples in her original motion, is essentially that I misconstrued the evidence in this case and, had I correctly understood the evidence, I would "have found for the most part in favor of the Plaintiff." Plaintiff's Motion under FRCP Rules 52(a) and 52(b) at 21. The short answer to this is that plaintiff has litigated her case, and that I have applied my best efforts to weighing the evidence and finding the facts and applying the law properly. The plaintiff, in a motion based on little more than a review of arguments already made, has offered me no cogent reason to change those findings and conclusions.

Plaintiff's second argument here, suggested in her addendum to her motion, is that a proper reading of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981)

requires that the defendant in a Title VII case "come forth with admissible evidence that the reasons for his/its actions are not pretextual but legitimate and nondiscriminatory ones." Plaintiff's Addendum at 6. If plaintiff believes that I used a standard that made it too easy for the defendant to meet its burden once plaintiff had established her prima facie case, I state here my conclusion that, in each situation where it was required, defendant "clearly set forth, through the introduction of admissible evidence, the reasons for [its employment decision]," *Burdine*, *supra* at 255, and plaintiff failed to show that defendant's reason was pretextual, leading me to conclude that plaintiff failed to meet her burden of proof.

3. Motion for Attorneys Fees: Under 42 U.S.C. § 2000e-5(k), the court in a Title VII case like this "may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs." Both plaintiff and defendant have moved for attorney's fees and both have requested a briefing schedule and a hearing. Plaintiff's motion for attorney's fees can be easily dismissed, since she is not the prevailing party. Just as clearly, defendant here is the prevailing party. Attorney's fees in a Title VII case may be awarded to a prevailing defendant only upon a finding that the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith. *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, 421-22 (1978).

On the basis of the evidence currently before me, I find that plaintiff's action, although without merit, was not frivolous, unreasonable, without foundation, or brought in bad faith. *See, e.g.*, Section VI of my Memorandum of September 3, 1982. Defendant has requested a hearing on its motion for attorney's fees and leave to submit affidavits and other documents in support of its motion. Unless defendant intends to offer new evidence sufficient to show that plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith—that is, evidence not currently before the court and evidence not merely cumulative of evidence before the court—I will not award attorney's fees to defendant.

I therefore allow defendant thirty days to file a response disclosing whether or not it has new evidence sufficient to support an award of attorney's fees and, if so, to proffer a statement of what that evidence will be. Upon review of the proffer, if one is made, I will decide whether to allow a hearing.

ORDER

For the reasons stated above, plaintiff's motions for a new trial, for amended and additional findings and amended judgment, and for attorney's fees are denied.

Defendant is allowed thirty days to disclose whether it has new evidence sufficient to support an award of attorney's fees and to proffer a statement of what that evidence is.

/s/ ROBERT E. KEETON
United States District Judge

APPENDIX C

TRIAL TRANSCRIPT, June 22, 1982, pages 10-12

* * *

THE COURT: Now, the problem that confronts me is expounded by the fact that you have not complied with the spirit and purpose of my order for proposed findings in advance.

The findings you have submitted are not the kind of findings I must make as fact-finder when I render a judgment on this case. They are very conclusional.

I do not have the slightest idea what kind of proof you propose to offer in these matters. And, therefore, I cannot determine whether the defendant has or has not had reasonable notice and an adequate opportunity to prepare.

I could well justify, I think, a decision simply to deny your motion for amendment because of the lateness of its assertion and my notice to you in a conference after counsel had been changed that if you wished to press that amendment, you should bring it to my attention and let us get it out in the open **[page 11]** and get a ruling on it.

Now you bring it to my attention the morning of trial and with proposed findings that I am inclined to think do go beyond the scope of the original complaint. I don't quite understand how you argue that matters other than denial of raises, assignment to probation and discharge are within the scope of the original complaint.

I think I will propose to you that I deal with the matter in the following way, although I will hear you if either of you oppose this.

Let us proceed with the proof. If the defendant objects to the scope of any of the proof on the ground that it's going outside the original complaint and, therefore, raises the issue shortly as to whether the amendment is to be allowed, alert me to it as proof comes in, and I will rule.

Now, I might say to you that we're confronted with this problem because of the inadequate advance preparation by counsel and the failure to comply with my orders. I am always

troubled, however, by having cases decided on penalties for that kind of preparation rather than decided on the merits. And the general spirt of the rules in favor of allowance of amendment, as long as it is done with **[page 12]** fair notice to opposing counsel and they have an opportunity to respond, would lead me to be inclined to allow the amendment and deal with the issues on the merits unless it appears that there is not an adequate opportunity to prepare for it and to present responses and prove it.

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OPENING STATEMENT—MR. CANONI, pages 31-32

* * *

Your Honor, you probably are quite familiar with Title 7 cases, but I think it will be appropriate for me just to say two words on the burden of proof and the question of intent because I think that's important in this kind of case.

The burden of proof, your Honor, is a tripartite situation. And the First Circuit Court has ruled on it, the Supreme Court has ruled on it. They've set it out rather succinctly. It operates in a fashion so that the plaintiff goes forward and makes—tries to make out a prima facie case of discrimination. The burden then shifts to the defendant.

Now, that is a burden solely of production. In other words, the burden on the defendant is simply to explain the action that the plaintiff has characterized. And courts have described it as the burden of articulating a legitimate non-discriminatory reason for the action.

Now, once the defendant does that, does the articulating, then the burden goes back to the plaintiff to prove that the defendant's articulated reason is not a true reason but a pretext and what is very important. Your Honor will probably expect, **[page 32]** the burden—the ultimate burden, the burden of persuasion, rests, remains with the plaintiff at that point so the plaintiff must prove the case. There are a number of First Circuit opinions that have set this standard out. So that the burden of persuasion always remains with the plaintiff.

The other point I would like to point out at the beginning of the trial, your Honor, is this is what is known in Title 7 parlance as a disparate treatment case. There are two kinds of cases under Title 7. There are disparate impact cases and disparate treatment cases. A disparate impact case is a case where a facially neutral policy such as a test or a high school requirement or something like that has a disparate impact on minorities or women or something like that. In such a situation intent is irrelevant or not important. However, when you shift

over to a disparate treatment case where the allegation is made that the employer did something to me because I am black or because I am a female, now in that kind of case the Supreme Court of the United States and the First Circuit have both held that in that kind of case the plaintiff must prove discriminatory intent. So I did want to emphasize to your Honor that those are the applicable standards.

* * *

TRIAL TRANSCRIPT, August 18, 1982, pages 1658-1659

PROCEEDINGS

THE COURT: Good morning. I did want to confer with you yesterday, as I probably should have, about order of proceeding. But I infer that you have agreed that you would follow the Massachusetts custom under which the Defendant argues first, the Plaintiff then argues, rather than Plaintiff opening and having rebuttal.

MR. CANONI: That's correct.

THE COURT: All right. That's fine. You may proceed.

MR. CANONI: Your Honor, I would like to say two things. First of all, Ms. Doona and I have agreed we will waive the filing of briefs. We feel that the closing arguments would sufficiently pose the issues for your decision. So that this would be the last—

THE COURT: Very well.

MR. CANONI: And before I begin, I want to thank the Court and the Clerks for their courtesies and cooperation extended to me and my associate for accommodating the scheduling of the trial dates and the witnesses.

In the instant case, we have labored through eleven trial days to deal with what, in my judgment, are a series of claims that are frivilous and without merit. And on **[page 1659]** behalf of my client, I respectfully request this Court to enter a judgment dismissing the Plaintiff's complaint with prejudice and with costs. We, also, intend at the appropriate time to request an award of reasonable attorney's fees as provided under Title 7.

We have already submitted a brief on the Rule 41(B) motion that discusses the pertinent legal precedents. The Court is aware, and I believe it is conceded by the Plaintiff, that in a disparate treatment case such as the present case Plaintiff must show intentional discrimination. I will, accordingly, devote my attention today principally to the facts as developed through the 19 witnesses and the 62 exhibits.

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TRIAL TRANSCRIPT, August 18, 1982, pages 1687-1688

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THE COURT: Thank you.

Ms. Doona.

MS. DOONA: Thank you. Good morning, your Honor. At this time I wish to take the opportunity to thank the Court for its patience and courtesy extended to me and to my client during the days of trial. And I thank Mr. Clerk and the stenographer and my brother, Mr. Canoni.

This is a case that my client, Plaintiff, has [page 1688] alleged that she has been sexually discriminated against by the Defendant, Allyn and Bacon, a publishing firm. There has been many days of much testimony produced on—throughout this trial. And the thrust of the entire case has been by the Plaintiff that she has been discriminated against under the terms and conditions of her employment and retaliation for having complained about the terms and the conditions and the wages that discriminated against wages that she had received as a woman.

Mrs. Johnson has come forward here and has testified and has produced considerable amount of documentary evidence showing, she submits, that indeed Allyn and Bacon has discriminated against her because of her sex.

Now, as to the allegations of discrimination in the terms and the conditions of employment and in the assignment of wages that she received as opposed to those received by a male, I would like to outline exactly the testimony as I recall it to the best of my memory and hopefully, your Honor, I can capsulize it as truthfully and as clearly as was testified to by the individuals on that stand.

Mrs. Johnson claims disparate treatment against her was indeed intentional by her employer, Allyn and Bacon.

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